SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

MICHAEL VAN HEUVER, a Minor, by and through his Guardian ad Litem, LISA VAN HEUVER, Plaintiff, vs. SAN LUIS COASTAL UNIFIED SCHOOL DISTRICT, MORRO BAY HIGH SCHOOL, JASON ROBERTS and DOES 1 through 50, Defendants.	Case No.: CV060779 [Consolidated with Case No. CV070234] ORDER REGARDING DISCLOSURE OF DOCUMENTS
MELISSA OLSON, Plaintiff vs. SAN LUIS COASTAL UNIFIED SCHOOL DISTRICT, MORRO BAY HIGH, JASON ROBERTS, Defendant.	

This case is before the Court following briefing and argument on issues related to the disclosure of documents that have been sought by plaintiffs in discovery but

denied by defendants on the basis of various asserted privileges. The Court ordered *in camera* review but then stayed the matter so that defendants could seek appellate review. On October 2, 2008, the appellate court denied a stay of disclosure without prejudice pending this Court's *in camera* review.

There are four documents at issue: 1) a report prepared by Mike Bruffey of the Schools Insurance Program for Employees ("SIPE") dated October 17, 2005; 2) an undated, typewritten statement prepared by Jason Roberts that is attached to Bruffey's report; 3) a letter of reprimand to Jason Roberts from Principal Pete Zotovich dated October 24, 2005; and, 4) a letter of appeal authored by Jason Roberts to Pete Zotovich dated October 28, 2005.

The Court has conducted *in camera* review of each document. Having fully considered the briefs, arguments and evidence submitted by the parties, the Court's ruling with respect to each document is as follows:

1. Bruffey's October 17, 2005 memorandum to Jeff Guy

There is nothing contained on the face of this memorandum that would identify the document as coming within the attorney-client privilege or the work product doctrine. Bruffey's position at the time was insurance safety coordinator. His memorandum was directed to Jeff Guy, the school district safety coordinator for SIPE.

Although the memorandum analyzes the causes of the accident and recommends corrective actions, there is no reference to potential litigation. No lawyers are mentioned or identified, nor is any mention made of potential liability. Moreover, this communication is not made *from* a school district employee *to* the insurance company, but rather *from* the insurance company representative *to* a school district employee.

Nevertheless, courts have recognized, rather broadly, that an accident report prepared for use by an insurance carrier may be protected by the attorney-client privilege if the insurer is obligated to defend the insured. *Travelers Ins. Companies v. Superior Court* (1983) 143 Cal.App.3d 436. The key question is not whether an attorney has yet been retained, so long as the communication was intended to help the

attorney who ultimately is hired to handle the defense. *Id.* It also does not matter that a lawsuit had yet to be filed. *Soltani-Rastegar v. Sup.Ct. (Brinzo)* (1989) 208 CA3d 424, 427. However, the dominant purpose of the witnesses report must be for transmission to an attorney in order for the privilege to apply. *Scripps Health v. Sup.Ct. (Reynolds)* (2003) 109 CA4th 529, 534 (confidential "occurrence report" prepared by hospital employees in anticipation of litigation protected by attorney-client privilege).

The declaration of Mike Bruffey submitted in opposition to disclosure ("Bruffey declaration") states that the "primary purpose" of his report was to "evaluate liability and document findings for evaluation by legal counsel." Bruffey's declaration satisfies defendants' burden of proving that the attorney-client relationship covers this written report. *Soltani-Rastegar v. Superior Court* 208 Cal.App.3d at 426; *Scripps Health v. Superior Court* 109 Cal.App.4th at 533.

2. The undated, typewritten statement of Jason Roberts

Defendants claim that Roberts' typewritten statement, like Bruffey's memorandum, is protected by the attorney-client privilege. As stated, defendants bear the burden of proving that this typewritten statement was prepared at the behest of Roberts' employer and that the dominant purpose of this statement was to assist in an investigation of potential legal claims. *Soltani-Rastegar v. Superior Court* (1989) 208 Cal.App.3d 424-426.

Unlike Bruffey's memorandum, defendants have not established that this typewritten statement was prepared primarily for purposes of assisting in an investigation. To the contrary, both Bruffey's report and declaration refer to a group interview of Roberts in the auto shop classroom at 1 p.m. on the day of the accident. It is clear that the oral interview of Roberts forms the basis of Bruffey's memorandum, which makes only passing reference to the attachment, Roberts' "earlier written statement." Further, neither the Bruffey nor Zotovich declaration states that Roberts' typewritten statement was prepared specifically at their direction to assist in an investigation.

There are many (unprivileged) reasons why Roberts may have decided immediately to put down his "recollection of memories" in writing. Defendants have not met their burden of showing that the attorney-client relationship covers this typewritten statement. *Compare Soltani-Rastegar v. Superior Court* (1989) 208 Cal.App.3d 424-426; *Scripps Health v. Superior Court* (2003)109 Cal.App.4th at 534-535. The contemporaneously-written statement of a party opponent is relevant to the upcoming trial, not only in terms of liability (which has now been conceded) but also causation and damages, and it should be produced.

3. The Zotovich letter of reprimand

Defendants claim that the Zotovich letter of reprimand, which was sent to the teacher/defendant Roberts and copied to Edward Valentine, School District Superintendent, and Rick Robinett, Personnel Director, is covered by the attorney-client privilege because some of the information developed by Bruffey was used by Zotovich. They also assert that disclosure of a personnel/disciplinary matter within the school system is prohibited by the right of privacy and by the privacy interests set forth in collective-bargaining agreement, which apparently states that "all disciplinary actions, investigations, appeals and related proceedings shall be conducted in an atmosphere of confidentiality." *See* Zotovich Declaration ¶ 8.

With respect to privilege, the defense has submitted no legal authority to support its contention that information purportedly subject to the attorney/client privilege but later used in a school disciplinary proceeding automatically retains a privileged status. Nor has the defense identified any *particular* information used in Zotovich's letter that is actually covered by this privilege. In any event, the issue is more properly examined in light of the right to privacy.

With respect to privacy, in a variety of contexts it has been well established that public employees have a legally protected right to privacy of their personnel files. *See, e.g., San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal.App.4th 1083, 1097 (tort litigation); *Teamsters Local 856 v. Priceless, LLC* (2003) 112 Cal.App.4th 1500, 1512-

1514 (Public Records Act).[1] Even where substantial privacy interests are involved, however, the right to privacy is not regarded as absolute. Rather, courts have developed balancing tests that weigh the interests in favor of nondisclosure against other interests that may be served through non-disclosure. *San Diego Trolley, Inc.* 87 Cal.App.4th at 1097; *BRV, Inc. v. Superior Court* (2006)143 Cal.App.4th 742, 755-760; *Teamsters Local 856 v. Priceless, LLC* (2003) 112 Cal.App.4th 1500, 1511, *Braun v. City of Taft* (1984) 154 Cal.App.3d 332.

The issue of confidentiality of personnel files arises most often in connection with potential disclosure of third party personnel matters in litigation or under the Public Records Act.[2] The *San Diego Trolley* case involved an accident causing personal injuries to the plaintiff, who sought psychiatric records of the trolley driver as well as other material in the trolley driver's personnel file. While much of the opinion discusses the right to disclosure of psychiatric records, the court confirmed that miscellaneous personnel records of the trolley driver were confidential:

> Finally, we turn to any other information which is in [the trolley driver's] personnel file or known to her supervisors. While we have not been directed to any statutory privilege which protects this information from disclosure, it is clear that [the trolley driver's] personnel records and employment history are within the scope of the protection provided by the state and federal Constitutions.

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1 For several reasons, the collective bargaining agreement referred to in the Zotovich declaration has little relevance. First, the Court was not provided with a copy of the entire agreement, but rather a snippet of one sentence. Second, the Zotovich declaration mentions only an "atmosphere of confidentiality", but does not discuss any *rights* the parties may actually have to confidentiality under this agreement. Third, adopting an "atmosphere of confidentiality" does not shield a document from disclosure. *Teamsters Local 856 v. Priceless, LLC* (2003) 112 Cal.App.4th 1500, 1513-1514.

2 Under the Public Records Act, the court weighs the nature of the privacy interests and then determines "whether the potential harm to privacy interests from disclosure outweighs the public interest in disclosure." *Versaci v. Superior Court* (2005) 127 Cal.App.4th 805, 818. Where investigations or complaints do not result in discipline, courts are disinclined to order disclosure. *Chronicle Pub. Co. v. Superior Court* (1960) 54 Cal.2d 548, 566, 568. However, where complaints are of a substantial nature and there is reasonable cause to believe they are well-founded, courts tend to order disclosure. *Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041 ("*Bakersfield*"). However, this case does not arise under the Public Records Act. Indeed, it does not appear that any request under this statute has ever been made by plaintiff.

> "California courts have generally concluded that the public interest in preserving confidential information outweighs the interest of a private litigant in obtaining the confidential information.
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> "[T]he balance will favor privacy for confidential information in third party personnel files unless the litigant can show a compelling need for the particular documents and that the information cannot reasonably be obtained through depositions or from nonconfidential sources. Even when the balance does weigh in favor of disclosure, the scope of disclosure must be narrowly circumscribed. *San Diego Trolley*, 87 Cal.App.4th at 1097 (citations omitted). *See also El Dorado Savings & Loan Assn. v. Superior Court* (1987) 190 Cal.App.3d 342, 346; *Board of Trustees*, 119 Cal.App.3d at 526; *Harding Lawson Associates v. Superior Court* (1992) 10 Cal.App.4th 7, 12.

To be sure, the first page of the Zotovich reprimand letter, written only 10 days after the accident of October 14, 2005, speaks directly to the school district's liability, whether by virtue of its own conduct or as respondent superior vis-à-vis Roberts. The first page of this document reliably and concisely documents the events at issue in this lawsuit, and addresses the significant public interest in understanding the conduct of a school district employee as well as how the school district responded to allegations of negligence by one of its teachers. Further, disclosure of the first page of this document would not reveal any personal information pertaining to Roberts or others, but only the events on October 14, 2005. Moreover, the document does not implicate privacy concerns of other third parties, but rather only of one defendant in a civil suit.

On the other hand, the school district very recently admitted that it will not contest liability for the accident at trial, but rather only causation and damages. This admission significantly undercuts plaintiffs' showing of compelling need for this document. Defendants have already admitted that Roberts received a reprimand following the accident, as well as the fact that the required procedures were not followed by Roberts when the forklift was donated for use in the auto shop. Plaintiffs have also taken Roberts' deposition as well as those of other percipient witnesses.

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In balancing all of these competing interests, the Court concludes that plaintiffs have not carried their burden of showing a compelling need for this document and disclosure of the letter of reprimand is therefore not warranted. [3]

4. Roberts' response to the Zotovich letter of reprimand

The letter of appeal by Jason Roberts is subject to the same balancing test discussed in number 3, above. In balancing those interests here, the Court also concludes that disclosure of this letter of appeal is not warranted. Written only 4 days after the letter of reprimand and two weeks after the accident, Roberts' response primarily speaks to the issue of liability, which is no longer to be a significant issue at trial.

In balancing the competing interests, the Court concludes that plaintiffs have not carried their burden of showing a compelling need for this document and disclosure of the response to the letter of reprimand is therefore not warranted.

In summary, defendants are hereby ORDERED to disclose the undated typewritten statement of Roberts, but no other document. With the current trial date of November, 19, 2008, rapidly approaching, the Court will stay this order only for a period of 10 days in order to allow any party to seek appellate review.

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DATED: October 20, 2008

CHARLES S. CRANDALL
Judge of the Superior Court

[3] The corrective action and directives on the second page of the letter of reprimand are in the nature of remedial measures designed to prevent similar incidents in the future. Under the law, these points have less relevance to the upcoming trial and more justification for protection. The second page of the letter of reprimand would therefore not be ordered disclosed even if liability still remained an issue. *See, e.g., Teamsters Local 856 v. Priceless,* LLC, 112 Cal.App.4th at 1521-1523; *BRV, Inc. v. Superior Court* (2006)143 Cal.App.4th 742, 755-760